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THE CONTRACT OF HIRING.[1]

The opinions of the majority of the judges, and the judgment of the House of Lords, in *Emmens* vs. *Elderton*, (4 H. L. C. 624), confirming the judgment of the Court of Exchequer Chamber in *Elderton* vs. *Emmens*, (6 C. B. 160), notwithstanding the cases of *Aspdin* vs. *Austin*, (5 Q. B. 671) and *Dunn* vs. *Sayles*, (Id. 685), may be considered as having finally settled, that an agreement between A and B, that A will serve B for a term, and in consideration thereof B will pay a salary for such service, will, in the absence of any stipulation clearly indicating a contrary intention, raise an implied contract on the part of B that he will allow A to continue in the service until the end of the term, in order that the stipulated reward may be earned, and not a mere agreement to pay the salary at the end of the term. B is not bound to find actual work or employment for A, but he is bound to allow the relation of master and servant, or employer and employed, to continue during the term, subject, of course, to his right to dismiss A for misconduct. And the distinction between an agreement to employ or to engage the services of a person in the sense before mentioned, for a given term, and then to pay for such services at the end of the term, and an agreement simply to pay a given sum for services at the end of a certain term, is most important in its consequences. In the former case, the person employed has an immediate remedy, the moment he is dismissed without lawful cause, for a breach of the contract to employ, and will recover compensation in damages for such breach, which may be less than the stipulated wages payable at the end of the term, if it happens that he has the opportunity of employing his time beneficially in another way, and the employer is not then bound to pay the whole sum agreed upon. But if the agreement be that the person employed is to be paid a certain sum for his services at a certain time, provided he serves or is ready to serve, there being no contract to *employ* during the term, he can only maintain an action,

[1] From the London Jurist, of May 26th, 1855.

after that time has arrived, for non-payment, and then is entitled to recover the full amount, though his loss may be much less. And convenience is decidedly in favor of construing such agreements to be contracts to employ, as well as for the payment of wages. The question in the construction of these, as in all other contracts, is, what was the intention of the contracting parties; but the decision in *Emmens* vs. *Elderton*, shows that the strong leaning of the judges is, on grounds of policy and convenience, to hold all contracts for service on the one part, and for the payment of wages on the other, for a specified time, to be contracts on the part of the employer to maintain the relation of employer and employed during the term, (though he is not bound to supply work), and not merely to pay the wages, unless there be some stipulation in the contract, or circumstance connected therewith, clearly and distinctly showing a contrary intention on the part of the contracting parties. *Elderton* vs. *Emmens* was an action by an attorney against a company on an agreement between them, which, stripped of the difficulties which arose from the form of the pleadings, was, in substance, "that from a certain day the plaintiff, as attorney of the company, should receive a salary of 100*l.* a year, in lieu of rendering an annual bill for general business transacted by him for the company, and should, for such salary, advise and act for the company on all occasions and in all matters connected with the company, (the prosecuting, &c. of suits, and some other matters, for which he was to be paid the regular charges, excepted); and that, in consideration that the plaintiff would advise and act for the company in the manner and on the terms aforesaid, the company promised to pay him the salary of 100*l.* a year;" and the plaintiff alleged, as a breach of this agreement, that before the expiration of one year the company wrongfully dismissed him from their employment, and refused to employ him as such attorney of the company, and to pay him the said salary. The Court of Exchequer Chamber, and afterwards the House of Lords, held, that the "refusal to employ," as here alleged, in the breach, must be taken to mean, not a refusal to find actual work for the plaintiff, but, after verdict at least, in the sense which would support the declaration,

viz. a refusal to allow the plaintiff to continue in their service as their attorney—a refusal to continue the relation of employer and employed; and that the agreement showed a contract by the company, not merely to pay the plaintiff his salary at the end of the year, but to continue him in their service as their attorney for one year at least, though they were not bound to find work for him; and that therefore he was entitled to sue the company immediately on his dismissal, for the damages he thereby sustained, and was not bound to wait until the end of the year, and then sue for his year's salary;—and the majority of the judges commented strongly on the great inconvenience that would arise from a contrary construction of the contract; for if the only remedy was by action for the salary, the party employed could enter into no inconsistent employment, but must remain idle during the term; for if he acted otherwise he could recover nothing, because he would not have continued ready to serve until the salary became due. Indeed, it is still an open question whether a person who has engaged to serve for a certain time, at certain wages, and who is wrongfully turned away by his master before that time has expired, is at liberty to elect to treat the dismissal as no dismissal at all, and to demand at the expiration of the term for which he was hired, the whole of his stipulated wages, on the ground that his readiness to serve is equivalent in law to actual service. Mr. Smith, in his notes to *Cutter* vs. *Powell*, (2 Smith's L. C. 19, 20), states the result of the authorities to be, that a clerk, agent, or servant has his election of three remedies:—First, he may bring a special action for his master's breach of contract in dismissing him, and this remedy he may pursue immediately. (*Pagani* vs. *Gandolphi*, 2 Car. & P. 370). Secondly, he may treat the contract as rescinded, and may *immediately* sue on a quantum meruit for the work actually performed; (*Planché* vs. *Colburn*, 8 Bing. 14); but in that case, as he sues on an implied contract, arising out of actual services, he can only recover for the time he has *actually* served. (And see *Fewings* vs. *Tisdal*, 1 Exch. 295; 11 Jur. 977, accordante). Thirdly, he may wait until the termination of the period for which he was hired, and may then, *perhaps*, sue for his whole wages in indebitatus assumpsit,

relying on the doctrine of constructive service. (*Gandell* vs. *Pontigny*, 4 Camp. 375; *Collins* vs. *Price*, 5 Bing. 132; vide tamen the observations of the judges in *Smitth* vs. *Hayward*, 7 Ad. & El. 544). As observed by Crompton, J., (4 H. L. C. 646), "It is clear, since the case of *Fewings* vs. *Tisdal*, that this last remedy cannot be maintained in the shape of indebitatus assumpsit, for the simple reason that the allegation of the defendant being indebted for work done is untrue. But the question is still left undecided, how far a special action of debt, averring a contract to pay, a continuing readiness to serve, and a dismissal from service on the part of the master, might not be maintained." And in p. 644 the learned judge, commenting on the inconveniences of allowing such an action, says, "It would be much to be lamented if a servant or agent who was dismissed should be able to say, 'I could easily get another situation as good, or better, but I will not do so, and instead of claiming the real damage I have sustained by the inconvenience and temporary loss of situation, I will bring an action for every instalment of salary, till the contemplated period has elapsed." And Parke, B., in the judgment in the Exchequer Chamber, (6 C. B. 187), said, "If it be held that such a contract as this is for service and pay respectively, and that although the employer has determined the relation by an illegal dismissal, the employed may entitle himself to the wages for the whole time, by being ready to serve, a doctrine would be sanctioned that would be of pernicious consequence, as in the case of a business being discontinued, or a dismissal for misconduct without legal proof."—(And see the observations of Erle, J., in *Beckham* vs. *Drake*, 2 H. L. C. 606).

There are two cases (*Aspdin* vs. *Austin*, 5 Q. B. 671, and *Dunn* vs. *Sayles*, Id. 685) cited in *Emmens* vs. *Elderton* which were questioned[1], but not distinctly overruled. It is, however, difficult to reconcile them with the principle of that decision. Parke, B., indeed, in delivering the judgment of the Court of Error, (6 C. B. 187), and in his opinion before the House of Lords, (4 H. L. C.

[1] See the opinions of Erle and Crompton, JJ.

669, 670), held that *Aspdin* vs. *Austin* and *Dunn* vs. *Sayles*, were clearly distinguishable from the case then before the Court: the former on the ground, that if the Court had there held that the defendant had contracted to continue to employ the plaintiff for the term of three years, the defendant would have been obliged, at however great a loss, to continue his business for that time; and the latter upon a similar ground, and also that in the indenture sued upon in that case the words, "it is agreed," which would make the stipulation the agreement of both parties, were wanting. It is at least questionable whether the distinctions taken by the learned baron are satisfactory. In *Aspdin* vs. *Austin*, by an agreement between the plaintiff and the defendant, the plaintiff agreed to manufacture for the defendant cement of a certain quality; and the defendant, on condition of the plaintiff performing such engagement, promised to pay him 4*l.* weekly, during the first two years following the date of the agreement, and 5*l.* weekly during the third year, and also to take him into partnership as a manufacturer of cement at the end of the term; and the breach assigned was, that the defendant refused to permit the plaintiff to continue in the service of the defendant during the three years. The Court held that the agreement did not raise an implied promise that the defendant would continue the plaintff in his service during the three years, or any part thereof; though the defendant was bound by the express words to pay the plaintiff the stipulated wages during that period, if the plaintiff served, or was ready to serve, according to his contract. And Lord Denman, in delivering the judgment of the Court, said, "The breach here assigned by the plaintiff assumes that the defendant, at however great loss to himself, was bound to continue his business for three years; but the defendant has not covenanted to do so; he has covenanted only to pay weekly sums for three years to the plaintiff, on condition of his performing what on his part he has made a condition precedent; and the plaintiff will be entitled to recover those sums, whether he performs that or not, so long as he is ready, and willing, and offers to perform it, and is prevented only by the defendant from doing it. This, then, is the safe rule for determining the rights of these parties between

each other, and no injustice follows to the plaintiff. If he should assign a breach in the non-payment of the weekly sums, it would be no answer for the defendant to say that he had discontinued the business and dismissed the plaintiff; the reply would be, that he might indeed, if he pleased, do both, but that he was still bound to make the payment which he had expressly covenanted to make." It is submitted, that it is scarcely correct to say that the breach in this case assumed that by the agreement the defendant *bound* or *obliged* himself to carry on his business for three years; for if the defendant at any time abandoned his business, he would not be liable to be sued by the plaintiff in terms for such abandonment; the only effect of such a course would be to render him liable to an action by the plaintiff for refusing to continue him in the service, and the measure of damages which the plaintiff would recover would be the loss which he sustained by his dismissal. It is true, that if the defendant ceased to carry on the business, he could not perform his contract to employ the plaintiff in that business; but, as observed by Lord Denman, (5 Q. B. 683), "it would be an extension of the principle of *Sampson* vs. *Easterby*, (6 Bing. 644), *Saltoun* vs. *Houston*, (1 Bing. 433), and other cases cited in the argument, to hold, that where parties have expressly covenanted to perform certain acts, they must be held to have impliedly covenanted for every act convenient or even necessary for the perfect performance of their express covenants." And the covenant by the defendant to carry on the business would seem to be in its nature more extensive than a mere covenant to employ the plaintiff in the business, though as between the plaintiff and the defendant the damages arising from a breach of either covenant would be the same. But even assuming that if the Court had construed the agreement as amounting to a covenant to employ, such a construction must necessarily have raised an implied contract to continue the business, it is difficult to see how that could afford any ground for presuming an *intention* on the part of the defendant to covenant only for the payment of wages, and not to employ; for if the defendant must be taken to have known that the effect of covenanting to employ in the particular business for three years would be to raise an

implied contract to carry on the business, he must be presumed to be also cognizant of the consequences of a breach of his covenants. Now, as between the contracting parties in an agreement for the plaintiff to serve and the defendant to employ and pay wages, whether the plaintiff sued for a breach of the contract to employ, or on the implied covenant to carry on the business, the damage sustained by the plaintiff would be precisely the same, the only loss sustained by the plaintiff by the abandonment of the business being the loss of his employment. As, therefore, in such an agreement, the injury to the defendant, in case of a breach of the supposed implied covenant to carry on the business, would not exceed the injury which he would sustain from the breach of the covenant to employ, there does not appear to be any sufficient reason for saying that the circumstance that an implied covenant to carry on the business arises, negatives an intention to enter into a contract to continue the plaintiff in the defendant's service, any more than the implication of a contract simply to employ would do. For a breach of either of these covenants, all that the plaintiff could obtain would be damages for his dismissal; and whether that dismissal was caused by the defendant giving up his business, or by any other cause, the damages would be the same; and these damages, in the great majority of cases at least, must be less than the salary, which, according to the doctrine laid down in *Aspdin* vs. *Austin*, the plaintiff might sue for from time to time until the end of the term. The inconvenience and hardship to the master is increased instead of diminished by compelling him, in the event of his giving up his business, to pay his workmen the full amount of salary for the period of their engagements, instead of the smaller amount, which in most cases would compensate them for the loss sustained by their dismissal. The inconvenience to the public, and to the servant himself, arising out of such a doctrine has been already pointed out in the passages cited from the judgment of the Exchequer Chamber in *Elderton* vs. *Emmens*, and the observations of Erle and Crompton, JJ., in the House of Lords. *Dunn* vs. *Sayles* was decided upon precisely the same ground as *Aspdin* vs. *Austin*, and for the same reasons as those above urged it is submitted that it

must be considered as substantially overruled by and not distinguishable from, *Emmens* vs. *Elderton*. With respect to the other ground on which this case was distinguished by Parke, B., viz: the omission of the words "it is agreed," it must be remarked, that in *Emmens* vs. *Elderton* those words were no doubt most important, for the agreement was simply that the plaintiff should receive and accept a salary of 100*l*. a year; and without the words, "it is agreed between the plaintiff and the defendant that" &c., there would have been no covenant by the defendant even *to pay the salary*, from which alone the covenant to continue the plaintiff in the service, so as to enable him to earn the salary, could be implied; but in *Dunn* vs. *Sayles* there was an *express* covenant by the defendant to pay the plaintiff wages, and it is from the covenant to pay wages for services, that, according to *Emmens* vs. *Elderton*, the implied covenant by the employer to continue the employed in the service arises. Parke, B., in his opinion in the House of Lords, (4 H. L. C. 667), himself says, "I think that there is clearly implied, on the part of the person who contracts to pay a salary for services for a term, a contract to permit those services to be performed, in order that the stipulated reward may be earned, besides an agreement to pay the salary at the end of the term." In *Sykes* vs. *Dixon*, 9 Ad. & El. 693, there being only an agreement by A to serve C for twelve months, without any contract by B to employ A, the Court held the agreement void for want mutuality; but in that case there was *no contract by B to pay wages* for the service, from which a covenant to employ could be implied. The recent case of *Reg.* vs. *Welch*, 22 L. J., M. C., 145, decides that where, in a contract to serve for a term, the wages to be paid to the servant for such service are not a fixed sum, but are to be *measured by the amount of work done*, the fact that the wages are so made dependent on the work done raises an implied obligation on the part of the employer to find a reasonable quantity of work for the servant, for otherwise the employer would be under no obligation to pay the servant any wages. And see *Pilkington* vs. *Scott*, 15 M. & W. 657.